STATE OF MICHIGAN

COURT OF APPEALS

EDWARD M. MILLER,

Plaintiff/Counter-Defendant-Appellant,

v

REHABILITATION INSTITUTE, INC., SINAI HOSPITAL OF GREATER DETROIT, INC., and DETROIT RECEIVING HOSPITAL & UNIVERSITY HEALTH CENTER, INC.,

Defendants/Counter-Plaintiffs-Appellees,

UNPUBLISHED
October 12, 2006

No. 269483
Wayne Circuit Court
LC No. 05-515533-CZ

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendants' motion for summary disposition. We affirm.

Basic Facts and Procedural History

On August 21, 2004, Craig Veucasovic sustained serious injuries while operating a motor vehicle titled to his mother, Barbara Veucasovic. Craig received medical treatment from defendants, and Barbara sought personal injury protection (PIP) benefits for Craig from State Farm Mutual Automobile Insurance Company, through which the vehicle was insured. She and Craig eventually hired plaintiff as their attorney, hoping that he would help them secure the PIP benefits.

Plaintiff contended by way of the complaint in the instant case that State Farm had, before Craig and Barbara hired him, resisted payment of the benefits, "possibly seeking to evade payment by asserting that Craig was an excluded driver under the State Farm policy and/or that the vehicle had been taken and driven wrongfully without the consent of Barbara[.]" Plaintiff additionally alleged that he

> met with a claims representative of State Farm at his office, and arranged for Barbara . . . to provide a recorded statement to State Farm's representative.

> Thereafter, in whole or in part due to plaintiff's efforts, State Farm agreed to make payment of at least major portions of . . . [the] medical and hospital expenses[.]

Plaintiff sought one-third of the benefits paid under his contingency fee agreement with Craig and Barbara, contending that the money belonged to Craig and that Craig had agreed to plaintiff's having a lien against the benefits. Eventually, plaintiff filed suit. Defendants disagreed with plaintiff's claim and also filed a counterclaim, asserting that plaintiff was illegally withholding certain checks to which defendants were entitled.

Defendants moved for summary disposition under MCR 2.116(C)(10). The trial court rejected plaintiff's primary authority, *Aetna Casualty & Surety Co v Starkey*, 116 Mich App 640; 323 NW2d 325 (1982), finding it distinguishable. Instead, the court, relying on *Garcia v Butterworth Hosp*, 226 Mich App 254; 573 NW2d 627 (1998), agreed with defendants' arguments and granted their motion for summary disposition.

Documentary Evidence

The documentary evidence presented below established several pertinent points. On September 1, 2004, State Farm sent Craig a letter indicating that his claim was "under investigation." On that same date, State Farm sent a letter to Barbara indicating that it "may have no duty to pay" the benefits sought. On October 25, 2004, State Farm sent another letter to Barbara, indicating that it would not pay the benefits "until our investigation to determine if Craig qualifies for benefits under our policy is completed." Some point before November 1, 2004, a State Farm claims adjuster indicated that Barbara would be required to provide a recorded statement to State Farm. This notification prompted Barbara to hire plaintiff, and the contingency fee agreement was signed on November 1, 2004. On November 10, 2004, Barbara gave her statement to the State Farm claims adjuster, and on November 12, 2004, State Farm formally agreed to pay for the claimed benefits. Barbara indicated that State Farm informally agreed to pay the benefits at the end of Barbara's statement on November 10.

When asked why she retained plaintiff, Barbara testified at her deposition:

> I hired Mr. Miller after Craig came home and State Farm was saying no, no, no and I says [sic] – and we just kept going around and around. They wanted me to come in and talk with them like a deposition or something like that, and I figured there's just something not right here, so I called Mr. Miller.

She also stated: "My insurance company had refused to cover any claims and I didn't feel that was right and I was coldly ignored and discontinued with them [sic]." She then clarified that she hired plaintiff after a State Farm claims adjuster told her that she would have to give a recorded statement. Barbara testified, "I didn't trust not having a legal service with me. So that's when I asked [plaintiff] to set in [sic]."

When asked at his deposition if he could describe the services he performed between November 1 and November 10, 2004, plaintiff replied:

> With complete accuracy, no, I can't. I'm sure I would have gathered what documents I could from the client, probably did a little basic research, made the appointment for the examination under oath, counseled the client as to how to respond in the examination under oath, and attended it.

Plaintiff further testified that he had a ten- or fifteen-minute discussion with the State Farm claims adjuster on the date of Barbara's statement. Plaintiff testified that he could not recall how much time, in total, he spent on Barbara's and Craig's claim and that he did not make notes of the time he spent. When asked, "[C]an you ballpark it at two hours, three hours, give hours? I can't imagine it was 50 hours," plaintiff responded, "I can't imagine it either. . . . [R]ather than making an inaccurate guess, I'll make no guess." When the opposing attorney suggested that plaintiff had not known State Farm's position before the time of Barbara's recorded statement, plaintiff stated: "Well, all I had to go on was my clients telling me they were giving her the runround [sic] and bills were piling up. They were not paying them. She felt she needed my help."

Jane Ruppman, the director of patient accounting for defendant Rehabilitation Institute, Inc., submitted an affidavit indicating that defendants did not request plaintiff's services and had not even been aware of his involvement in the situation until after State Farm began making payments. Ruppman additionally stated:

> To my knowledge, State Farm never denied coverage of this claim. Any alleged "services" performed by Mr. Miller were performed without [defendants'] knowledge, consent or request and were entirely unnecessary. If attorney involvement had been necessary, [defendants have] attorneys on staff.

Standard of Review

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition. We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court, like the trial court, must look at the record as a whole and, giving the nonmoving party the benefit of the doubt, determine if the record creates open issues on which reasonable minds could differ. *Id; Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). The moving party has the initial burden of supporting its position by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact exists. *Id.* "Where the burden of proof at trial on a dispositive issue rests on the nonmoving party, that party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 574 NW2d 314 (1996). If the opposing party fails to present documentary evidence showing that there is a genuine issue of material fact, summary disposition is appropriate. *Id* at 362-363.

Analysis

On appeal, plaintiff again relies, in part, on *Starkey* to support his position. In *Starkey*, *supra* at 642, the defendant's son was struck and injured by an uninsured motorist and received medical treatment at a hospital. *Id*. The plaintiff, which insured defendant's automobile, claimed that causation had not been established between the automobile accident and the boy's condition, and it therefore refused to pay for the medical bills. *Id*. Defendant "retained an attorney under a contingent fee agreement who was able to establish to [the plaintiff's] satisfaction a causal connection between the accident" and the boy's condition. *Id*. The plaintiff agreed to pay the medical bills, but the defendant's attorney asserted that he was entitled to one-third of the payment as his attorney fee. *Id*. at 642-643.

The Court of Appeals agreed with the defendant's attorney, stating:

> In the instant case, defendant and her attorney entered into a contingent fee arrangement whereby the attorney would receive his fee from any settlement or judgment recovered. On the basis of the general principles of law concerning attorneys' charging liens, defendant's attorney had the right to receive his fee from any fund, including the PIP fund, recovered as a result of his services in connection with the auto-accident injuries suffered by defendant's son. [*Id.* at 644.]

In responding to the medical providers' argument that they did not request the assistance of the attorney and therefore should not be required to pay him, the Court reasoned:

> The providers knew that the attorney was expending time and energy in substantiating the insurance claims which led to their payment by [the plaintiff]. They were willing to accept his assistance in the knowledge that it would result in their payment. Only when it became clear that the attorney would have to assert his lien against the only existing fund, the PIP benefits, did the providers move to deny the attorney his share. [*Id.* at 648.]

At first blush, *Starkey* does seem to provide some support to plaintiff's position in the instant case. However, in 1998 this Court issued *Garcia*, an opinion that is binding on this Court under MCR 7.215(J)(1) and that we find dispositive here.

In *Garcia*, *supra* at 255, the plaintiff was injured in an automobile accident and sought PIP benefits from two insurance companies. The plaintiff filed a lawsuit, which was dismissed without prejudice for failing to serve the defendants in a timely fashion. *Id*. The plaintiff then sought a ruling with regard to attorney fees, stating that the defendants had not been served because one of the insurance companies had agreed to pay the benefits but that "the suit was filed as a protective measure because the period of limitation was scheduled to expire shortly after plaintiff first consulted his attorney." *Id.* at 256. The plaintiff's attorney stated that he had made significant efforts in an attempt to obtain the insurance payments. *Id*. The trial court, citing *Starkey*, ruled that the attorney was entitled to one-third of the benefits payable to the treating hospital. *Id*. This Court reversed the trial court's ruling, stating:

> The facts of our case . . . are distinguishable from those in *Starkey*. . . . Here, plaintiff's insurer agreed beforehand to pay for any treatment connected to plaintiff's accident. It then paid benefits without contesting them. Plaintiff's attorney filed this lawsuit as a precautionary measure, but the matter was dismissed before ever being served on defendants. In fact, from our review of the attachments in this case, it would appear that defendant Farmers Insurance and Butterworth [Hospital] worked this matter out between themselves, without the intervention of plaintiff's attorney. Thus, plaintiff's attorney's efforts were not comparable to the considerable effort put forth by the attorney in *Starkey*. . . . Finally, to the extent that our decision can be read as inconsistent with the legal reasoning of *Starkey*, we expressly decline to follow it. [*Id.* at 257.]

The *Garcia* Court noted that *Starkey* was not strictly binding on the Court of Appeals under MCR 7.215(H) (the predecessor of MCR 7.215[J]) because it was decided before November 1990.

This case is analogous, in pertinent part, to *Garcia*. Plaintiff's efforts here "were not comparable to the considerable effort put forth by the attorney in *Starkey*. . . ." *Garcia, supra* at 257. Plaintiff stated that he "probably did a little basic research, made the appointment for the examination under oath, counseled the client as to how to respond in the examination under oath, and attended it." Unlike in *Starkey, supra* at 642, there is no evidence in the record that plaintiff's services somehow led to State Farm's decision to pay the benefits. Instead, the evidence indicates that State Farm had been investigating the claim and, after considering Barbara's recorded statement, decided that the claim was valid. There is simply no evidence to conclude that plaintiff's efforts affected State Farm's decision. Unlike in *Starkey, supra* at 642, the insurer here did not "refuse[] payment under the policy" before an attorney was hired; instead, State Farm indicated that it had not yet determined whether payment under the policy was appropriate.

In accordance with *Garcia,* we reject plaintiff's arguments on appeal. We note that even an aspect of *Starkey* supports our decision in the instant case. As we stated above, in responding to the medical providers' argument that they did not request the assistance of the attorney in question and therefore should not be required to pay him, the *Starkey* Court reasoned:

> The providers knew that the attorney was expending time and energy in substantiating the insurance claims which led to their payment by [the plaintiff]. They were willing to accept his assistance in the knowledge that it would result in their payment. Only when it became clear that the attorney would have to assert his lien against the only existing fund, the PIP benefits, did the providers move to deny the attorney his share. [*Id.* at 648.]

Here, there is no evidence indicating that defendants knew of plaintiff's involvement in the case before State Farm agreed to pay the benefits sought. Accordingly, it would not be appropriate, under the specific circumstances of this case, for plaintiff to obtain one-third of the payments due to defendants.

This conclusion corresponds with State Bar of Michigan Ethics Committee Formal Opinion C-226 (September 1982), which dealt with an issue similar to that facing us today and which states, in part:

> It is clearly unethical for a lawyer to charge [a] hospital a fee for medical payment voluntarily paid by the client's no-fault insurance carrier, under circumstances where no express lawyer-client relationship exists between the hospital and the lawyer.
>
> However, there is a distinction between benefits "voluntarily" paid and benefits "involuntarily" paid. "Involuntary" is understood to mean a situation where the insurance carrier has denied the rights to benefits after submission of a proper request for payment, and the lawyer is compelled to extend considerable professional service on the client's behalf, which efforts result in the payment of damages by the carrier, including a recovery for expenses incurred by the hospital on the client's behalf.
>
> In the case of involuntary payment, the hospital assumes the appearance of a third-party beneficiary of the lawyer's time and effort. In this case it would not be unreasonable or unethical to permit the lawyer to charge the hospital a reasonable fee in the absence of an express lawyer-client agreement, *provided that the hospital is first notified in writing of the lawyer's contemplated legal action which is likely to benefit the hospital, and the hospital is given a reasonable opportunity to advise the lawyer that it wishes to pursue its interests in the matter without the lawyer's assistance*. [Emphasis added.]

Here, even assuming that the payments at issue can be characterized as "involuntary," there is no evidence that defendants were properly notified about plaintiff's involvement in the case and given the choice to "pursue [their] interests in the matter without the lawyer's assistance." *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio